



Pretrial Release Advocacy

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Goals

The goal of this presentation is to share ideas about utilizing the bail law and rule to decrease pre-trial detention and educate prosecutors, courts and stakeholders.

Why is the Issue of Bail so Important

In Mississippi, 56% of the 12,000 people in county jails have not been convicted of a crime and are awaiting trial.

<https://www.aclu-ms.org/en/campaigns/mississippi-needs-cash-bail-reform>

What is Neighborhood Defender Service?

Client-Centered
Community-Based
Holistic
Collaborative

Innovative
High-Quality
Effective



- Only the Client Can Identify The Best Case Outcome
- Only the Client Knows the Most Important Information
- Clients Who Trust Their Attorneys Trust Their Advice

Public Defenders in popular culture



We must combat preconceived notions regarding court appointed counsel. We do this in all of interactions with clients, their families, courts, prosecutors and other stakeholders. It starts at the client interview and begins in earnest at arraignment or during the first bail argument, where your client, for the first time, gets to see you advocate on their behalf.

NDS in Arraignments

- Client interview
- Calls to family and friends
- Social workers in arraignments

“Pretrial decisions determine mostly everything”

Caleb Foote 1956
Candace McCoy 2007
Sacks & Ackerman 2012

Compared to clients released at some point prior to trial, clients held in detention for the entire pre-trial period had:

- 4X Greater likelihood of being sentenced to jail

- 3X Longer jail sentences

- 3X Greater likelihood of being sentenced to prison

- 2X Longer prison sentences

• Lowenkamp & VanNostrand (2013). "Investigating the Impact of Pretrial Detention"

Impact on Our Client's Lives

- Loss of job.
- Loss of support for client's family.
- Loss of connections in the community which could have/are having a positive impact on the client's life.
- We make these arguments at arraignments.

The Impact of Pretrial Detention on Public Safety

When compared to clients who secured release within 24 hours, low and moderate risk clients who spent time in jail - even just a few days - before securing pretrial release were **significantly** more likely to commit new crimes

- LowenKamp & VanNostrand (2013). "The Hidden Costs of Pretrial Detention"

M.R.Cr.P. Rule 8.2

Rule 8.2. Right to Pretrial Release on Personal Recognizance or on Bond

Currentness

(a) **Right to Release.** Any defendant charged with an offense bailable as a matter of right shall be released pending or during trial on the defendant's personal recognizance or on an appearance bond unless the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court shall impose the least onerous condition(s) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court shall take into account the following:

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WHO IS (NOT)
BAILABLE AS A
MATTER OF RIGHT?

Miss. CONST. ART. 3, § 29

(1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, **except...**

Exception One: Capital Offenses
Art. 3, § 29(l)

(1) ... except for **capital offenses** (a) **when the proof is evident or presumption great; or** (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.

Exception One: Capital Offenses
Art. 3, § 29(l)

What is a capital offense?

For the purposes of Article 3, Section 29, **“a capital case is any case where the permissible punishment prescribed by the Legislature is death...”** *Ex parte Dennis*, 334 So.2d 369, 372 (Miss. 1976) (citation omitted).

Exception One: Capital Offenses
Art. 3, § 29(l)

Do **not** be led astray by Miss. Code Ann. § 1-3-4, which defines “capital offenses” to include “offenses and crimes punishable by death **or** imprisonment for life in the state penitentiary.”

Exception Two: New Felony Art. 3, § 29(2)

(2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked....

Exception Two: New Felony Art. 3, § 29(2)

For the purposes of this subsection (2) only, the term "felony" means any offense punishable by death, life imprisonment or imprisonment for **more than five (5) years** under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection."

Exception Three: 20 Yrs & "A Special Danger" Art. 3, § 29(3)

(3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.

Rule 8.2

(a) **Right to Release.** Any defendant charged with an offense bailable as a matter of right shall be released pending or during trial on the defendant's personal recognizance or on an appearance bond unless the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court shall impose the least onerous condition(s) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court shall take into account the following:

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What the Court Must Consider
(i.e. Your best friends- fret not! Think about each one in your arguments)

- The age, background, and family ties, relationships, and circumstances of the client.
 - this would be the time to make arguments regarding clients circumstances and effect of incarceration- most important part of our job- humanizing our client to an often hostile court.
- the client's reputation, character, and health
 - What is health care like in jail?
 - What issues would be exacerbated for your client in a jail environment?

- the client's prior criminal record, including prior releases on recognizance or on unsecured or secured appearance bonds, and other pending cases.
 - Has your client made multiple court appearances?
 - Has your client made over a dozen appearances on that pending case?
- the identity of responsible members of the community who will vouch for the client's reliability.
 - for young clients----parents? did you speak to teachers?
 - for clients involved in programming in the community- reach out to caseworkers or other service provider.

- violence or lack of violence in the alleged commission of the offense.
- the nature of the offense charged, the apparent probability of conviction, and the likely sentence, INSOFAR AS THESE FACTORS ARE RELEVANT TO THE RISK OF NONAPPEARANCE.
 - we need to focus the court on the fact that it is NONAPPEARANCE that is a factor not that the government's case is strong. Of course, if it's a weak case always fair game.
- the type of weapon used.
- threats made against victims or witnesses.
 - On DV case, if threat made---does client know where they are going to stay on release.

- the value of property taken during the commission of the offense.
- whether the property taken was recovered or not, and damage or lack of damage to the property allegedly taken.
- residence of the client
 - real property ownership
 - have they been a lifelong resident of the county or nearby counties?
- in cases where the client is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond.
 - What is the evidence that your client is not engaged in drug selling or distribution? Inside or outside the case?

- consideration of the client's employment status and history, the location of the client's employment and the client's financial condition.
 - this can be a double edged sword.
- sentence enhancements, if any, included in the charging instruments.
- any other fact or circumstance bearing on the risk of nonappearance or on the danger to others in the public.
 - considerations? Lots!

RELEASE PURSUANT TO Rule 8.2

If "bailable as a matter of right":

(1) There is a presumption in favor of "personal recognizance."

(2) If the presumption is overcome, the court must impose "the least onerous conditions."

Reasons for Denying Bail- Mississippi Rule of Appellate Procedure 9

(a) Release Prior to a Judgment of Conviction. A petition challenging an order refusing or imposing conditions of release shall be heard promptly by the Supreme Court or the Court of Appeals if the case has been assigned to the Court of Appeals. **Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken....**

Rule 8.1(b), Unsecured Appearance Bond

Unsecured Appearance Bond. An “unsecured appearance bond” is an undertaking to pay a specified sum of money to the clerk of the circuit, county, justice, or municipal court, for the use of the State of Mississippi or the municipality, on the failure of a person released to comply with its conditions.

Unsecured Appearance Bonds

Unsecured appearance bonds should be requested in all cases. It allows judges to set bail, but does not require clients or a surety to post any money for release, it is simply a promise to pay. The problem we encountered was that the clerk’s office did not have the forms for this kind of bail in NYC.

Bail Funds

- Consider Bail Funds.
- Bail funds will interview clients and pay the bail.
- In NYC, we found that, in its first year, 95% of clients who were bail funded out made all subsequent court appearances.
